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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 46.

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

J. C. PENNEY COMPANY, a Delaware Corporation,

Respondent.

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

I.

The Opinions of the Court Below.

The opinion and dissenting opinion in the Supreme Court of Wisconsin filed January 16, 1940, are reported in 233 Wis. 286 (1940), in 289 N. W. 677, and are printed in the Record at p. 77.

II.

Jurisdiction.

The jurisdictional statement in the brief filed by counsel for petitioners indicates that they predicate the jurisdiction of this court upon Section 237 (b) of the Federal

Judicial Code (28 U. S. C. A. 344(b)) upon the ground that the assessment of tax made by the Wisconsin State Tax Commission against the respondent was held by the Supreme Court of Wisconsin to be invalid under the Fourteenth Amendment to the Constitution of the United States. Respondent contends that the court below relied upon the Wisconsin State Constitution as well as the United States Constitution and that accordingly this court is without jurisdiction. *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52 (1934); *Leathe* v. *Thomas,* 207 U. S. 93 (1907); *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288 (1936). This court granted petitioners' petition for writ of certiorari (310 U. S. 618).

III.

Statement of the Case.

The statement made under this title at pages 5 to 8 inclusive of petitioners' brief is substantially correct. It should be noted, however, that Section 3 of Chapter 505, Laws of Wisconsin 1935, as amended, which is the statute here involved, is entitled "Privilege Dividend Tax" and imposes a tax which is said to be "For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state (Wisconsin) * * *".

The principal question here at issue is the constitutionality of an assessment made by the Wisconsin State Tax Commission under this statute with respect to dividends declared and paid outside the state by respondent, a foreign corporation. There is an additional question, however, concerning the applicability to the facts of the instant case of the presumption contained in Subsection 4 of the statute which presumption concerns the source from which dividends are paid. This question was not decided by the Wisconsin Supreme Court inasmuch as it held the assessment invalid upon other grounds.

A separate section of petitioners' brief is entitled "Summary of Facts". As petitioners state these facts are not in dispute and they are partially covered by stipulation (R. 43). Inasmuch as petitioners' summary omits numerous facts which we regard as material, however, we have taken the liberty of setting them forth in somewhat more detail.

The respondent was incorporated under the laws of Delaware on December 15, 1924 and has a statutory office in that state (R. 26). Its principal office for the transaction of business is located at 330 West 34th Street, New York City, and was located there during the years 1934, 1935 and 1936. It is qualified to do business as a foreign corporation both in the State of New York and the State of Wisconsin (R. 27). In 1934, 1935 and 1936 and presently the respondent was and is engaged in the business of operating retail department stores in all of the 48 states of the Union (R. 27, 28). During 1934 it operated 47 stores in the State of Wisconsin. In 1935 and 1936 it operated 48 stores in Wisconsin (R. 28) but had no executive offices in Wisconsin, its sole business therein consisting of the operation of the stores mentioned (R. 34). During the years 1935 and 1936, the respondent was required to pay a franchise tax as a domestic corporation in the State of Delaware. During the same period, it paid taxes to New York as a foreign corporation. During the years 1934, 1935 and 1936, it filed returns and paid income taxes to the State of Wisconsin (R. 27). It also made a report of the payment of the dividends here involved but took the position that it was not liable for the tax and never paid it (R. 27).

At the end of the calendar years 1934, 1935 and 1936 the respondent had a large surplus (R. 35) which represented the accumulated earnings from many years derived from all of the states of the Union (R. 41). Wisconsin earnings and earnings for particular calendar years were not segregated and had lost their character as earnings derived from any particular source long before the dividends here involved were paid, and it would be an utterly impossible task to

figure what part of the surplus was attributable to income of Wisconsin stores (R. 29, 41, 42).

Section 34 of the Delaware Corporation Law under which respondent was incorporated, is the law from which it derives its power to pay dividends. This law provides:

> "The directors of every corporation created under this chapter subject to any restrictions contained in its certificate of incorporation shall have power to declare and pay dividends upon the shares of its capital stock, either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Sections 14, 26, 27 and 28 of this chapter, or (b) in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding year" (R. 38).

Acting pursuant to this authority respondent declared and paid the following dividends upon the dates set forth below:

Date Paid	*Amount Per Share*	*Total Amount Paid to Stockholders*
12/31/35	$2.25	$ 5,555,214.00
3/31/36	.75	1,851,738.00
6/30/36	.75	1,851,738.00
9/30/36	1.00	2,468,984.00
12/15/36	4.75	11,727,674.00

(R. 31).

The resolutions pursuant to which these dividends were declared specifically stated that they were declared from the surplus of the company (R. 35); and in view of the fact that there was a surplus, this was the only source from which they could have been made payable under the Delaware law.

By a notice of additional assessment dated July 16, 1937 the Wisconsin State Tax Commission assessed a Privilege Dividend Tax against the respondent in the amount of $22,696.37 together with interest and penalties (R. 49) (Ex. A, R. 46) (R. 63). This assessment was made

pursuant to Chapter 505 of the Wisconsin Laws of 1935 effective September 26, 1935, as amended by Chapter 552 of the Laws of 1935, effective October 9, 1935, Chapter 233 of the laws of 1937, effective June 15, 1937, and Chapter 309 of the Laws of 1937, effective July 1, 1937. In making its assessment the Wisconsin State Tax Commission ignored the actual source of the dividend payments as above set forth and applied the presumption that the dividends in each case were paid from an exactly proportionate part of Wisconsin earnings, for the year preceding the one in which the dividends were paid. This presumption was applied in the case of 1936 dividends even though the record shows that two million more dollars were paid out in dividends in 1936 than total earnings of 1935. The manner in which the Wisconsin State Tax Commission calculated such tax is as follows:

During the year 1934, the respondent had a total net income computed on a Wisconsin income tax basis of $16,022,607 and in 1935 a total income (computed in the same manner) of $15,233,478 derived from business transacted in all 48 states. Under the formula set forth in the Wisconsin income tax law, $562,331 of the above net income for 1934 and $587,001 of the above net income for 1935 were allocable to Wisconsin as derived from business transacted in that state (Ex. A, R. 46). Using these income tax figures, the Wisconsin State Tax Commission ascertained that the percentage of the 1934 income allocable to Wisconsin was 3.5096% and that the percentage of 1935 income so allocable to the State of Wisconsin was 3.8558%. After multiplying total dividends paid in 1935 by .035096, and total dividends paid in 1936 by .038558, the resulting figures were multiplied by the rate of tax fixed by the State Tax Commission (.025641) and penalties and interest were added, the final figure being the amount of the assessment (Ex. A, R. 46).

The rate of tax, 0.25641, was used by the State Tax Commission instead of the statutory rate of .025 because of a ruling of the Tax Commission that when a corporation

failed to deduct the tax from the dividend it in effect paid a tax which was due from the stockholder, thus increasing his dividend by this amount. Under the decision of the State Tax Commission on July 21, 1938 (R. 20) the rate of tax fixed by the State Tax Commission was reduced from .025641 to .025, reducing the principal amount of the tax assessed to $22,128.97 and reducing the interest and penalties to $1,457.82 making a total of $23,586.79.

The following are certain of the details with respect to respondent's manner of conducting its operations and disbursing its funds. The total proceeds from the sales of goods in Wisconsin stores and in stores in all other states are deposited in local banks. From such accounts, payments are made for local payrolls, rents, advertising and other local expenses. The balance not needed to meet such expenses is transferred to the Company treasurer's office in New York City and deposited in New York City banks to the general credit of the respondent (R. 29). After funds leave the local Wisconsin banks no one in that state has anything further to do with them (R. 30). The monies, after leaving the local banks, completely lose their identity as monies derived from any particular source. The funds so deposited to the credit of the company in New York are used to pay salaries, general overhead of the New York and other offices, taxes and dividends. Checks are also drawn upon the New York accounts in payment for merchandise purchased from all sources and shipped to the various stores of the company, including those in Wisconsin (R. 29).

All of the stock books, minute books and the secretary's records of the company are kept within the State of New York except that a duplicate stock ledger is kept in Delaware as required by the laws of that state. All transfers of shares of the company are made in New York by the transfer agent of the company. All directors and stockholders meetings of the respondent are held in the State of New York and the dividends involved in this assessment were declared at directors meetings held at the principal

offices of the company at 330 West 34th Street, New York City (R. 30, 31). The actual payment of such dividends was effected by the executive officers of the company who caused checks to be drawn upon the accounts of respondent in its New York banks, payable to the stockholders of record upon each dividend record date. Such checks were placed in envelopes addressed to each stockholder of record upon each dividend record date at his address as the same appeared upon the records of the company, and were duly mailed from the post office in New York City (R. 32). All of the books and records of the company used in the payment of such dividends were situated in the State of New York (R. 31). No act in connection with the declaration or payment of the dividends in question was performed within the State of Wisconsin and no act in connection with the receipt of such dividends was performed in Wisconsin except that a small percentage of stockholders of the company received their mail in that state (R. 32, 33).

On December 31, 1935 the percentage of respondent's stock held by Wisconsin residents was 1.33%; on March 31, 1936, 1.34%; on June 30, 1936, 1.36%; on September 30, 1936, 1.38%; and on December 15, 1936, 1.13% (R. 32). The following table shows (1) the total amounts received by Wisconsin residents on the payment of each of the dividends involved in this case; (2) the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings (this is calculated by the use of the percentages used by the Tax Commission in making its assessment); and (3), the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings upon the basis used by the State Tax Commission:

Dividend Date	(1)			(2)			(3)
12/31/35	$ 74,065.50	x	.035096	$2,599.40	x	2½%	$ 64.99
3/ 3/36	24,814.50	x	.038558	956.80	x	"	23.92
6/30/36	25,320.00	x	"	976.29	x	"	24.41
9/30/36	34,097.00	x	"	1,314.71	x	"	32.87
12/15/36	133,147.25	x	"	5,133.89	x	"	128.35
				Total	....		$274.54

The above figures represent the face amount of tax without penalties or interest (R. 33, 34).

The entire balance, amounting to $21,854.43 of said corrected assessment of $22,128.97 (without interest or penalties therefor) represents the tax on dividends received outside of Wisconsin by persons residing outside of the State of Wisconsin. Over 96% of the stockholders of the company owning 98% of the stock reside outside of Wisconsin (R. 33).

The respondent at no time deducted any of the alleged taxes from the dividends paid to its stockholders (R. 9, 48, 47; Ex. A, R. 46).

The Supreme Court of Wisconsin held the assessment referred to above unconstitutional under the Fourteenth Amendment to the Constitution of the United States. Petitioners thereafter filed a petition for a writ of certiorari which this Court granted, 310 U. S. 618.

IV.

Summary of Argument.

I.

The decision of the Supreme Court of Wisconsin is clearly correct in holding that the State of Wisconsin has no jurisdiction to tax the declaration and receipt of the dividends here involved. The state court construed the law to impose an excise or privilege tax upon the transaction of transferring dividends from a corporation to its stockholders. The state may not impose an excise tax upon a transaction which takes place beyond its borders. The privilege of paying dividends is conferred upon a corporation by the state of its incorporation. Jurisdiction in the State of Wisconsin can not be rested either upon the exercise of the privilege or right in that state or upon the ground that the privilege exercised was granted by its law.

In order to avoid this dilemma petitioners argue (a) that if the state has jurisdiction to tax property, it may impose a tax upon the devolution of such property and (b) that the state has a right to tax the surplus employed in paying the dividends involved in this case because respond-

ent earned a part of the funds comprising such surplus within the State of Wisconsin. Respondent contends that neither of these propositions is sound.

As to the first, an excise tax is a tax imposed upon a privilege, transaction or act rather than upon property. Accordingly the place of exercise of such privilege or in which such transaction or act occurs, not the situs of the property involved for purposes of ad valorem taxation, determines state jurisdiction to tax.

As to petitioners' second proposition, even if the rules of jurisdiction governing property and succession taxes be applied, the fact that respondent's surplus may have included funds which were originally added to it as a result of Wisconsin earnings is insufficient to rebut the presumption that the intangibles of a corporation are taxable only by the state of incorporation. No case has held that the original derivation of earnings alone is sufficient to give bank accounts containing them a situs for taxation purposes in the state of such derivation and there are many which affirmatively indicate that it is not.

The tax can not be sustained upon the same jurisdictional basis as an income tax upon foreign corporations which do business within the state. The tax is not an income tax upon the corporation. The statute declares that it is for the privilege of declaring and receiving dividends and the Supreme Court of Wisconsin has so held. Furthermore, it is not similar to such an income tax as an income tax is levied upon the earning or accrual of income which takes place within the state, not upon a transaction which takes place elsewhere. The incidence of the Privilege Dividend Tax is where the statute places it, upon the declaration and receipt of dividends, not upon the earning of income by the corporation.

The analogies which petitioners seek to draw from certain of the succession tax cases are remote and conflict with many decisions of this Court. The property, franchise and Civil War income tax statutes referred to by petitioners are not at all similar to the instant law as the subject of tax in each of such cases was admittedly proper.

II.

The Wisconsin State Tax Commission in making the assessment here involved purported to follow a presumption set forth in subparagraph 4 of the law. In so doing it "presumed" that respondent in paying its dividends employed that proportion of its Wisconsin earnings for the preceding year which its total Wisconsin earnings for such preceding year bore to respondent's total income for such preceding year. This presumption is clearly contrary to the facts because such dividends were specifically declared by respondent's directors as provided by statute from its surplus which represented the accumulated earnings of respondent and its predecessor company for many years and from all of the states in the Union. Wisconsin earnings entering into such surplus had lost their character as such long before the dividends in question were paid. Furthermore, respondent's total 1936 dividends were considerably larger than its 1935 earnings from which they were presumed to have been paid. If the presumption established by subparagraph 4 of the statute is rebuttable, it is rebutted by the facts in the record. If construed to require a finding contrary to the admitted facts, it is unconstitutional as arbitrary and unreasonable.

There is a third possibility that the presumption should be interpreted as establishing a rule of substantive law which directs the source to be used in the payment of dividends. This subject, however, is governed by the law of the state of incorporation and that of no other state. The Corporation Law of Delaware in which respondent is incorporated gave respondent power to pay dividends from surplus and made it illegal for it to pay them from any other source. Any attempt by the State of Wisconsin to lay down a different rule amounts to an unconstitutional interference with the duties and privileges of a foreign corporation exercised beyond its jurisdiction.

POINT I.

The opinion of the Supreme Court of Wisconsin is clearly correct in holding that the State of Wisconsin was without jurisdiction to tax the declaration and receipt of dividends here involved.

In its opinion below the Supreme Court of Wisconsin held an assessment of taxes made by the Wisconsin State Tax Commission under Section 3, Chapter 505, Laws of Wisconsin, 1935, as amended, against the respondent unconstitutional under the Fourteenth Amendment to the Constitution of the United States. The provisions of the law pertinent to this controversy are:

> "Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.
>
> (2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.
>
> (3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.
>
> (4) In the case of corporations doing business within and without the State of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the State of Wisconsin. The

amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state."

As stated in petitioners' brief the constitutionality of this statute was first considered by the Supreme Court of Wisconsin in the case of *State of Wisconsin ex rel. Froedtert Grain & Malting Co. Inc.* v. *Tax Commission of Wisconsin*, 221 Wis. 225, 265 N. W. 672 (1936), in an action for a declaratory judgment instituted by a Wisconsin corporation. The statute was held to be constitutional. Upon motion for rehearing it was argued among other things that the law was invalid as to foreign corporations and consequently entirely void. Although no foreign corporation was a party to the suit, the court concluded, in view of the importance of the question and the fact that several foreign corporations had submitted briefs, to consider its validity as to such corporations. It then held the tax constitutional as to foreign as well as domestic corporations. 221 Wis. 240, 267 N. W. 52. As petitioners contend that the opinion of the Supreme Court of Wisconsin delivered upon the motion for rehearing in the *Froedtert* case rather than its opinion in the instant case is correct, respondent has hereinafter at pages 22, 23, 24 analyzed the grounds of decision in said opinion in detail.

The Supreme Court of Wisconsin has been consistent in its construction of Section 3, Chapter 505, Laws of Wisconsin, 1935, as amended, as imposing "* * * an excise or privilege tax upon the transaction involved of transferring

the dividends from the corporation to its stockholders" (Instant case, 233 Wis. 291; Froedtert case, 221 Wis. 233). Because of the contention raised in the *Froedtert* case that the Privilege Dividend Tax was in effect a property tax upon the dividends and accordingly invalid as to non-resident stockholders, the Supreme Court of Wisconsin discussed its nature at some length both in its original opinion and in its opinion upon the motion for rehearing.

There are several quotations from the opinions in the *Froedtert* case discussing the nature of the tax which we would like to add to those included in petitioners' brief. At page 231 in the *Froedtert* case the court said:

> "* * * The briefs in opposition to the tax are largely beside the case, because they do not recognize the true nature of the tax. The tax is a privilege tax, or an excise tax, one form of which is a tax imposed on the transfer of property. The federal government in its stamp taxes imposes a tax on the right to transfer property by deed; it formerly imposed a tax on the right to transfer funds in banks by check; it imposes taxes on the transfer of property by inheritance or will. These taxes are best characterized as a tax on the transaction involved. * * *"

Upon the motion for rehearing the court said at page 243:

> "The brief on motion for rehearing assumes that we have held the tax imposed by the statute to be against the corporation. We did not in the original opinion take the position that the tax is necessarily one against the corporation. We pointed out that one decision of the Supreme Court of the United States, *Barnes* v. *Philadelphia & R. R. Co.*, 17 Wall. 294, 21 L. Ed. 544, has held that a tax on corporate dividends payable by the corporation was one against the corporation, and that another, *Travis* v. *Yale & Towne Mfg. Co., supra,* has held that the only liability for a tax on salaries of non-residents payable by a corporation was imposed upon the corporation and treated the tax as in effect a tax on the corporation. * * *"

> "If the tax is an excise tax, and we hold that it is, it is entirely immaterial upon whom the burden of it ultimately falls. In a sales tax it falls, usually at least, upon the purchaser. In a stamp tax on deeds, it usually falls on the seller. In an inheritance tax, it falls on the recipient of the property. In the stock transfer tax above referred to it probably fell on the broker consummating the transfer. In a stamp tax on checks it falls on the drawer of the check. In none of the cases is it a personal property tax against the person upon whom the burden of it ultimately falls."

In the instant case the Supreme Court of Wisconsin reversed the position taken by it in its opinion on rehearing in the *Froedtert* case and held the assessment made by the Wisconsin State Tax Commission against the respondent unconstitutional upon the ground that the state had no jurisdiction to tax the declaration and receipt of the dividends here in question. Respondent submits that this decision of the Supreme Court of Wisconsin was clearly correct and in accord with the applicable decisions of this court. The best method of demonstrating the truth of this contention is to consider in order the various jurisdictional bases upon which petitioners have asserted or might assert that such jurisdiction rests and to demonstrate each to be without foundation.

(a) The State of Wisconsin may not levy an excise tax upon a transaction which takes place beyond its borders.

The evidence is clear and undisputed that in declaring and paying the dividends sought to be taxed all of the necessary acts were performed by J. C. Penney Company in the State of New York, that the dividends were paid from general funds standing to its credit in New York banks and that no part of the funds so applied could be earmarked as Wisconsin earnings or even as earnings for any particular year, and that J. C. Penney Company per-

formed no act in connection with the payment of such dividends in the State of Wisconsin (R. 29, 30, 31, 32, 35, 41). A very small part of the total dividends paid by J. C. Penney Company was mailed by it in New York to stockholders who received their mail in Wisconsin. This is the only "receipt" of dividends which might be said to have taken place in that state (R. 32, 33).

The decisions of this court clearly show the law to be that a state may not impose an excise tax upon a transaction which takes place beyond its borders.

The latest and most authoritative case upon the above proposition is that of *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77 (1938). In this case it appeared that the Connecticut General Life Insurance Company was a Connecticut corporation licensed to do business in California. In addition to writing insurance in that state it did a reinsurance business with other corporations licensed to do business in California, reinsuring them against loss on policies of life insurance effected by them in California and issued to residents of that state. Such reinsurance contracts were entered into in Connecticut and the premiums and losses, if any, were paid in that state. The California taxing authorities contended that the reinsurance premiums received by the Connecticut General Life Insurance Company in Connecticut were subject to the California franchise tax upon insurance companies, which imposed a tax of 2.6% on gross premiums received. The Supreme Court of California upheld this contention but its judgment was reversed by this Court which held that the tax might not constitutionally be applied to premiums "received" in Connecticut. In the course of its opinion this Court said at page 80:

> "Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *New York Life*

> *Insurance Co.* v. *Head,* 234 U. S. 149; *New York Life Insurance Co.* v. *Dodge,* 246 U. S. 357; *St. Louis Compress Co.* v. *Arkansas,* 260 U. S. 346; *Compania De Tabacos* v. *Collector,* 275 U. S. 87; *Home Insurance Co.* v. *Dick,* 281 U. S. 397; *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.,* 292 U. S. 143; *Boseman* v. *Connecticut General Life Ins. Co.,* 301 U. S. 196; *People ex rel. Sea Insurance Co.* v. *Graves,* 274 N. Y. 312; compare *Provident Savings Life Insurance Society* v. *Kentucky,* 239 U. S. 103."

The Supreme Court of Wisconsin placed its chief reliance upon this case in altering the position taken by it in its opinion on rehearing in the *Froedtert* case.

In the case of *James* v. *Dravo Contracting Co.,* 302 U. S. 134 (1937), this court in discussing the application of a West Virginia gross receipts tax to certain construction work performed by the plaintiff company said:

> "* * * Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax * * *" (p. 138).

For other cases to the same general effect see: *Provident Savings Association* v. *Kentucky,* 239 U. S. 103 (1915), and *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346 (1922).

It is obvious that unless it may be sustained upon some basis of jurisdiction other than territorial jurisdiction over the situs of the transaction, the tax is unconstitutional as applied to the dividends here at issue.

(b) Jurisdiction to tax may not be based upon the ground that the privilege exercised was granted by the State of Wisconsin.

The privilege of a corporation of declaring and paying dividends is conferred by its charter and by-laws and is derived solely from the law of the state of incorporation. In

Union & New Haven Trust Co. v. *Watrous*, 109 Conn. 268, 146 Atl. 727 (1929), the court said:

> "* * * Since the corporations in question are New York corporations, it follows that the laws of that state are the sole authority for their corporate act of separating a given sum from the corporate assets and setting it apart for the stockholder. This act of separation is one which fundamentally involves the internal policy and management of the corporation" (p. 730).

See also: *Turner* v. *Goetz*, 184 Wis. 508, 199 N. W. 155 (1924). J. C. Penney Company is a Delaware corporation and exercises its privilege of paying dividends pursuant to Section 34 of the General Corporation Law of that state which provides:

> "The directors of every corporation created under this Chapter subject to any restrictions contained in its Certificate of Incorporation, shall have power to declare and pay dividends * * *." (R. 38).

It is obvious that a privilege conferred by the laws of the State of Delaware cannot be the basis of a taxing jurisdiction in the State of Wisconsin.

(c) The State of Wisconsin may not as a price of doing local business require a corporation to submit to the imposition of taxes upon corporate activities elsewhere which would otherwise be beyond its jurisdiction.

The above proposition is too well settled to require any extensive citation of authorities. See, however, *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U. S. 77 (1938); *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1 (1910); *International Paper Co.* v. *Massachusetts*, 246 U. S. 135 (1918).

It should be further noted that no attempt has been made to employ this basis of jurisdiction either by the Wis-

consin Legislature or the state Supreme Court. The tax is an excise imposed upon the transaction of declaring and receiving dividends. It is not levied as a price for the privilege of doing local business nor for the earning of income within the state, a separate tax upon which has been paid (R. 27).

The brief filed by petitioners contains a discussion as to whether the tax may be said to be levied upon the exercise of a privilege or a right. There is, of course, no question but what either may upon appropriate occasion properly be the subject of a tax. In the instant case, however, if the tax be construed as upon the exercise of a right, it is invalid because the exercise occurs beyond the territorial jurisdiction of Wisconsin; if it be construed as upon the exercise of a privilege, it is invalid because the privilege is not one granted by the State of Wisconsin. The petitioners substantially concede this saying at page 48 of their brief:

> "* * * It is perfectly evident that the State of of Wisconsin may not, as an independent basis of taxation, tax the exercise of a privilege which it does not grant. Neither may it, as an independent basis of taxation, impose a tax upon a transaction which occurs without its territorial jurisdiction."

In order to avoid the dilemma so presented, however, they argue, and this, as we construe their brief as a whole, is the sole basis of jurisdiction urged by petitioners:

> (a) that, if a state has jurisdiction to tax property, it may impose a tax upon the devolution of such property, and
>
> (b) that the State of Wisconsin has jurisdiction to tax the declaration and receipt of the dividends here involved because a part of the surplus from which they were paid was originally derived from Wisconsin earnings,

(pp. 28, 29, 30, 31, 48, 50, 51 of petitioners' brief). It is necessary for petitioners to prevail upon both of these propositions in order to sustain the validity of the assess-

ment here at issue. It is respondent's contention, however, that neither is sound as applied to the facts of the instant case.

(d) The fact that a state may be able to establish a constructive or business situs of intangibles for the purpose of an inheritance or property tax does not give it power to impose an excise tax upon a transaction involving such property when no physical part of the transaction takes place within the state.

The nature of the tax here involved as an excise tax upon a transaction has been previously referred to. The Supreme Court of Wisconsin in its opinions in *State ex rel. Froedtert G. & M. Co.* v. *Tax Commission,* 221 Wis. 225 (1936), compared it among other things to a stock transfer tax (p. 240) citing *Hatch* v. *Reardon,* 204 U. S. 152 (1907), to a stamp tax on deeds and a tax on the right to transfer funds in banks by check (p. 231).

Generally speaking an excise tax is levied upon the privilege of acting within a state or taking some benefit from its law. (See Beale, *Conflict of Laws,* p. 621). Cooley in his work on *Taxation* defines them as "taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations and upon corporate privileges" (Fourth Edition, p. 127). Although there are some exceptions, the distinction generally recognized between an excise tax and a property tax is that the excise tax is said to be upon the act, transaction or use rather than upon property. The Supreme Court of Wisconsin recognized this distinction in the *Froedtert* case when it answered a contention that the tax was invalid as a tax upon property by saying:

> "If the tax were considered as a property tax, or as a tax imposed on the non-resident, this would be correct. But the tax is an excise tax, a tax on the transaction involved * * *". (p. 235).

Accordingly, the situs of such act, transaction or use; not of the property determines state jurisdiction to tax. See: *People ex rel. Hatch* v. *Reardon*, 184 N. Y. 431 (1906), affd. 204 U. S. 152; *Graniteville Mfg. Co.* v. *Query*, 283 U. S. 376 (1931); *Bickell* v. *Lee*, 5 Fed. Supp. 720, (D. C. Fla. 1, 1934). Modified 292 U. S. 415; *In re Paul's Estate*, 165 N. Y. Supp. 413 (Surr. Ct. N. Y. Co. 1917), affd. no. op. App. Div. 1st Dept. 167 Supp. 1117.

In *Hatch* v. *Reardon*, 204 U. S. 152, the seller and also the purchaser of certain corporate stock were residents of Connecticut. The contention was raised that the State of New York had no jurisdiction to levy a stock transfer tax even though the transaction took place there because the situs of the property sold was not within the state. The opinion of this court rejected this argument without much discussion. The opinion of Judge Vann of the New York Court of Appeals (*People* v. *Reardon*, 184 N. Y. 431) contains some language quite pertinent to the instant controversy, however. He said at page 448:

> "Fourth. It is insisted that a tax on the transfer of stock certificates issued by a foreign corporation and owned by a non-resident, although made within this state, is virtually a tax on property without the jurisdiction of the state.
>
> "This position is founded on the theory that the shares of capital stock of a corporation represent its property and if that property is not within the state the shares are not taxable here unless the owner resides here. The tax, however, is not on property, but on the sale of property, or on a particular kind of contract when made within this state. The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the state, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax when the contract to sell is made, and it is en-

forced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property.

"The question is whether the state has jurisdiction to impose a tax on a certain class of contracts when made within its territorial limits? Jurisdiction over the persons who make the contract does not depend on their residence, but on their presence within the state when the contract is made. Jurisdiction over property depends on its physical presence here, or if it is personal property, either its presence here or the residence of the owner here. The fiction of the common law, *mobilia sequuntur personam*, has no foundation in the Constitution and does not control the legislature, which rejects or adopts it at will as applied to the subject of taxation. When two citizens of Connecticut come into this state and make a contract here, to be enforced here, both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the state, and is as binding on them as if they resided in the state. Their rights and their obligations in reference to such a contract are the same as if they were citizens, no greater and no less. The fact that the contract, though made here, may relate to property, real or personal, situated elsewhere, has no bearing upon the question. By coming into the state they subjected themselves to its laws and to its taxing power, so far as the making of such a contract is concerned. It is immaterial whether the contract is between residents or non-residents, or between a resident and a non-resident, for if it is made within the state it is subject to

taxation by the state. This necessarily follows from the power of the state over the subject of taxation. It has power to tax all property within its territory, all business done and all contracts made within that territory, provided they are not protected as Federal agencies, whether the property is owned or the business is done or the contracts are made by residents or non-residents. 'It has never been questioned that the Legislature can impose a tax on all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers.' (*Matter of McPherson,* 104 N. Y. 306, 317).

"We think such specific or excise taxes are laid upon privileges rather than on property. (*Orr* v. *Gilman,* 183 U. S. 278, 289; *Clark* v. *Titusville,* 184 U. S. 329; *Thomas* v. *United States,* 192 U. S. 363; *Foppiano* v. *Speed,* 199 U. S. 501, 520). This was distinctly held in the *Thomas* case, and necessarily so held, for if a tax on certificates is a tax on property it is a direct tax requiring apportionment 'among the several states * * * according to their respective numbers' (Art. 1, § 2, par. 3). * * *"

If the rules suggested by the petitioners were sound, it would mean that an excise tax on withdrawals from New York bank accounts might be imposed by every state from which funds deposited in the bank were derived; it would mean that all such states might levy a sales tax upon transactions involving such funds. It would seem to require that any state from which earnings composing a part of the corporate surplus were drawn could levy a stock transfer tax. Certainly, it would mean that the states of domicile of the purchaser and seller might do so.

As previously stated the Supreme Court of Wisconsin held the Privilege Dividend Tax valid as to foreign corporations in its opinion on rehearing in the *Froedtert* case (221 Wis. 240). After again referring to the tax as a tax upon a transaction, and comparing the declaration of dividends to the transfer of stock the court continued (p. 242):

"* * * Of course, it does not follow that the state may impose the instant tax in case of a foreign cor-

poration because it may impose it in case of a domestic corporation. The declaring of a dividend by the foreign corporation and the transmittal of it would be done without the taxing state, and neither would be a transaction within it, nor would the funds out of which the dividend was paid be located within the taxing state at the time of payment. But the fact that the earnings made by a foreign corporation within a state are not located therein does not prevent the state wherein they are earned from taxing the earnings, nor from enforcing the collection of the tax. No more should the circumstances above stated prevent the state from imposing the instant tax or enforcing its collection. The case of *First National Bank* v. *Maine, supra,* also states that the United States Supreme Court has reserved the question whether stock, bonds, etc. owned by a non-resident may by reason of their use within a state acquire such a situs within the state as to make them subject to an inheritance tax. By implication the question whether they may not be so used as to acquire a situs for other forms of transfer tax is also reserved; and so is the question whether the dividends involved in the instant transfer tax, which have been earned within the state, have not such a constructive situs within this state as to render them subject to the tax imposed by the instant statute. * * *

"* * * We perceive no more difficulty in taxing the transfer of dividends of foreign corporations attributable to business transacted or property situated within the state than in taxing such corporations on income so derived, and the validity of the latter form of taxation is established. *The fact that the dividends involved are derived from earnings within the state gives them a constructive situs within the state.* They are as readily collectible as is an income tax against a foreign corporation. Liability for payment of the tax is imposed upon the corporation. If such liability may be imposed there is no difficulty about collecting it, and there is no more difficulty about imposing the liability than existed in the *Travis* case, supra, about imposing upon the employer liability for income tax on salaries of non-residents earned within the state." (p. 245) (Emphasis ours).

Several thoughts are mingled in the above quotation. The first of these is that the tax is valid because it can be collected. This is obviously not sufficient as a basis for jurisdiction and it is hardly likely that the Wisconsin court seriously considered it to be such.

In addition, two other more or less related possible bases of jurisdiction are mentioned:

> (1) that the surplus of a foreign corporation has a constructive or business situs in Wisconsin to the extent that it includes earnings originally derived from within that state;
>
> (2) that the jurisdictional basis upon which an income tax upon foreign corporations which do business within the state is sustained is sufficient to support the instant tax.

These bases in substance amount to a legal analysis or breaking down into its component parts of petitioners' second proposition mentioned at page 18 hereof; that is, that the State of Wisconsin has jurisdiction to tax the declaration and receipt of the dividends here involved because a part of the surplus from which they were paid was derived from Wisconsin earnings.

We shall consider separately the two bases derived from the above quotation from the opinion on rehearing in the *Froedtert* case and demonstrate that neither is sufficient to support the application of the Privilege Dividend Tax to the facts of the instant case. The discussion of these will necessarily dispose of the petitioners' second proposition.

(e) The State of Wisconsin had no jurisdiction to tax the corporate surplus of J. C. Penney Company at the time the dividends in question were paid notwithstanding that such surplus may have included funds made up in part of earnings originally derived from Wisconsin or to tax the part thereof made up of such earnings.

Newark Fire Insurance Co. v. State Board, 307 U. S. 313 (1939), has done much to clarify the law with respect to

constructive or business situs of intangibles. This court said (p. 318):

> "When a state exercises its sovereign power to create a private corporation, that corporation becomes a citizen, and domiciled in the jurisdiction, of its creator. There it must dwell. The dominion of the state over its creature is complete. In accordance with the ordinary recognition of the rule of *mobilia sequuntur personam* to determine the taxable situs of intangible personalty, the presumption is that such property is taxable by the state of the corporation's origin."

The court continued at page 319:

> "There are occasions, however, when the use of intangible personalty in other states becomes so inextricably a part of the business there conducted that it becomes subject to taxation by that state. * * *"
>
> "Where consideration has been given to the existence of a business situs of intangibles for taxation by a state other than the state of domicile, there has been definite evidence that the intangibles were integral parts of the business conducted. * * *
>
> " * * * To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity. The facts presented by this record fall far short of this requirement." (p. 321).

The facts there relied upon by petitioners to establish business situs in New York but thus adjudged insufficient by this court were:

> " * * * It is stipulated that a registered office is maintained in Newark, New Jersey, together with such books as the law required to be kept within the state. The only business carried on in this Newark office is a local or regional claim and underwriting department for Essex and three other counties. No executive officer is there and reports are sent to the New York office. The stipulation further shows that the company's 'executive officers and its executive

office are located at 150 William Street, New York City. The general accounts of the company are kept in the office in New York City. The general accounting, underwriting and executive offices of the company are all located at the main office at 150 William Street, New York City. All cash and securities of the company are located there or in banks in that City or in other banks outside of the State of New Jersey, with the exception of the sum of $6,425.32 on deposit in New Jersey banks. All of the general affairs of the company are conducted at the main office in New York City and have been so conducted there since appellant moved its main office from Newark six years ago.' No personal property tax is paid in New York. The company does pay there a franchise tax based upon premiums." (p. 316).

The above case demonstrates that the concept of business situs is no longer the vague concept the Supreme Court of Wisconsin seemed to consider it in its opinion on the rehearing of *Wisconsin ex rel. Froedtert G. & M. Co.* v. *Tax Commission*, 221 Wis. 240. It is susceptible of more or less exact definition and the facts upon which an alleged business situs is based must be shown with particularity if the presumption favoring domiciliary taxation is to be rebutted.

In the instant case the record discloses that funds consisting of the proceeds of sales of merchandise in Wisconsin (and in other states) not needed to meet local payrolls, rents, advertising and other local expenses are deposited to the general credit of the respondent in New York banks (R. 29). The funds so deposited are used to pay salaries, general overhead of the New York office, accounts payable for merchandise purchased and taxes. Dividends are also paid from these New York bank accounts (R. 29). The funds after leaving Wisconsin completely lose their identity as having been derived from any particular source (R. 29) and there is no one in Wisconsin who has anything to do with them (R. 30).

It is possible that these funds so deposited and used gained a business situs in New York, since the activities of

the company might conceivably be said to be sufficient to give it a commercial domicile there under the rule laid down in *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193 (1936). There is nothing in the facts of this case, however, except the fact of partial original derivation from Wisconsin upon which to base an alleged business situs in that state of the New York bank accounts used to pay the dividends here involved. This must necessarily be insufficient since in the *Newark Fire Insurance Co.* case the greater part of the corporate income must have been derived from outside of the State of New Jersey as it affirmatively appeared that the only business office of the company in New Jersey was a local office which handled the business of four New Jersey counties. This was adjudged to be insufficient to establish a business situs of the corporate intangibles outside of New Jersey.

We know of no case which indicates that original derivation of earnings alone is or might be sufficient to give bank accounts containing them a tax situs in the state of derivation and many which affirmatively indicate it is not. As previously stated, the Supreme Court of Wisconsin in changing its conclusion with respect to the validity of the Privilege Dividend Tax as applied to foreign corporations relied upon *Connecticut General Life Insurance Co.* v. *Johnson,* 303 U. S. 77 (1938), the facts of which are set forth at page 15 hereof. In that case the attorneys for the State of California argued that the state had jurisdiction to tax the receipt in Connecticut of premiums on reinsurance paid by other corporations licensed to do business in California to the plaintiff with respect to California risks because the reinsurance transactions were so related to business carried on by the Connecticut General Life Insurance Company in California as to be a part of it and because in any case no injustice was done since the state allowed a deduction to the original insurers for the amount of the reinsurance. This court rejected that contention saying:

> "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amend-

ment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *New York Life Insurance Co. v. Head*, 234 U. S. 149; *New York Life Insurance Co. v. Dodge*, 246 U. S. 357; *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346; *Compania General De Tabacos v. Collector*, 275 U. S. 87; *Home Insurance Co. v. Dick*, 281 U. S. 397; *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143; *Boseman v. Connecticut General Life Ins. Co.*, 301 U. S. 196; *People ex rel. Sea Insurance Co. v. Graves*, 274 N. Y. 312; 8 N. E. (2d) 872; cf. *Provident Savings Life Assurance Society v. Kentucky*, 239 U. S. 103. It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within.

"Appellant, by its reinsurance contracts ,undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. *Connecticut General Life Insurance Co. v. Johnson, supra*, 87; cf. *Morris & Co. v. Skandinavia Insurance Co.*, 279 U. S. 405, 408. Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by

> companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California law afforded to them no protection." (p. 80).

It is submitted that the above language is entirely in point. Point C of the petitioners' brief is devoted to an attempt to distinguish the *Connecticut General* case and states as a sort of a summary that the State of California was not permitted to tax business transacted in another state (p. 45). Petitioners then quote from the dissenting opinion in the instant case of Justice Fowler of the Supreme Court of Wisconsin, who said "the declaration of the instant dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed * * *".

The issue presented, of course, is whether the payment and receipt of the dividends here involved had any more connection with the earning of income in Wisconsin than the receipt of premiums in Connecticut had to do with original risks in California, the original insurance of them by other companies in California, or the general business conducted within the state by the Connecticut General Life Insurance Company. There seems little object in our going into detail upon this point as the considerations involved are self-evident. We might note in passing, however, that the funds used by the other insurance companies in paying the premiums on reinsurance could certainly be as logically identified with funds received from the original payments with respect to California risks as the dividends in the instant case with Wisconsin earnings.

As indicated by the Supreme Court of Wisconsin, the facts involved in *Connecticut General Life Insurance Co.* v. *Johnson*, supra, would seem to present a stronger case for the validity of the tax than those of the instant one. In

addition to the reason given by that court it should be noted that in the *Connecticut General* case it appeared that the California court had construed the tax to be "a franchise tax exacted for the privilege of doing business" in the state (303 U. S. 79). The substance of this Court's holding must have been that the receipt of reinsurance premiums in California was not sufficiently related to California business to justify the state's including the tax upon it as a part of the measure of such business. See *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143 (1915). The instant tax must stand or fall upon the validity of an effort to tax directly a transaction occurring outside of the state and may not claim the possible advantage that the California tax had of being nominally levied upon the local business which was actually transacted by the Connecticut General Life Insurance Company.

In *Provident Savings Association* v. *Kentucky*, 239 U. S. 103 (1915), the State of Kentucky levied a franchise tax upon insurance companies for the privilege of doing business in the state which was based upon a percentage of premiums received. The plaintiff, a New York corporation, ceased doing business in the state but continued to receive premiums from Kentucky residents with respect to policies previously executed. This Court held that the tax could not be applied to the plaintiff *because it was not enjoying the privilege taxed*, saying at page 112:

> "The present case thus differs from that of *Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143. It was not disputed that the Equitable Company was actually doing business in Pennsylvania. See *Commonwealth* v. *Equitable Life Assurance Society*, 239 Pa. St. 288, 293. The question was as to the permissible measure of a tax exacted for a privilege admittedly exercised. As this court said: 'The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax.' 238 U. S. 147. In the present case it is not the measure of the tax for doing business, but the very basis of the tax—that is, whether the Company

was doing business within the State—that is in controversy.

"Assuming this to be the point in dispute, the question at once arises whether the matter is reviewable in this court. And we cannot doubt that the question whether the State is taxing a foreign corporation for a privilege not granted, that is, whether the acts done by the corporation at the time to which the tax relates are of such a nature as to subject it to the local authority upon the ground that it is doing acts which can only be done with the permission of that authority must be regarded as a Federal question. Taxation without jurisdiction has been held to be a violation of the Fourteenth Amendment (*Louisville & Jefferson Ferry Co. v. Kentucky*, 188 U. S. 385, 398; *Del., Lack. & West. R. R. v. Pennsylvania*, 198 U. S. 341, 358; *Union Transit Co. v. Kentucky*, 199 U. S. 194, 209); and the principle involved applies to the assertion of authority on the part of the State to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control. It follows that the quality of the acts with respect to which the State exercises the taxing power must be considered when the constitutional protection against the transgression of jurisdictional limits is invoked."

Respondent submits that the *Provident Savings Association* case, supra, is very closely in point. If a tax upon doing business outside of the state is invalid although measured by premiums received from within the state, it is difficult to see how a tax upon the declaration and receipt of dividends outside of the state can be valid though the surplus from which they were paid may have included some income earned within the state.

Beidler v. South Carolina Tax Commission, 282 U. S. 1 (1930), is quite close upon its facts. In this case a resident of Illinois died in that state owning a majority of the stock of a South Carolina corporation and holding obligations of that corporation in the sum of $64,672.00 for declared and unpaid dividends and $555,864.22 for advances to the cor-

poration. The State of South Carolina attempted to impose its inheritance tax upon the unpaid dividends and other indebtedness claiming jurisdiction to tax upon the ground that the debtor was a domestic corporation and that the dividends and indebtedness thereby acquired a business situs within the state. The Supreme Court rejected this argument and held that the tax was unconstitutional as to both.

This case involved dividends declared by a South Carolina corporation engaged in business in the state, which so far as the record on appeal shows, derived its income from property and business operations in South Carolina. Notwithstanding the fact that the corporation's income used to pay the dividends in question came from within South Carolina, the court held that only the stockholder's domicile had the right to tax the devolution of the dividends from the decedent to his legatees. In answering the state's argument that the dividends and debt had a constructive situs in South Carolina, this Court said at page 8: "The conclusion that debts have thus acquired a business situs must have evidence to support it; * * *." The fact that the corporation was in South Carolina, its books were there and that its dividends were presumably earned and declared there was not sufficient to give them a constructive situs within that state. How then can it be urged that the fact that respondent's corporate surplus may have included funds originally derived from Wisconsin gave it or dividends subsequently paid from it a constructive situs there? The taxes are different but both are imposed upon the devolution of title to income, a part of which came from within the state seeking to impose the tax.

Rhode Island Trust Co. v. *Doughton*, 270 U. S. 69 (1926), should also be considered in connection with the foregoing cases since it indicates that the fact that the Privilege Dividend Tax contains a formula pursuant to which only income presumed to have been originally derived from within the state is made subject to tax does not save the law since the surplus in which it is merged at the time of imposition of the tax has no situs in Wisconsin.

The facts as shown by the record are insufficient to rebut the presumption favoring taxation at the domicile only. The language quoted from the *Connecticut General Life Insurance Co.* case is equally applicable here. The validity of a tax is to be "ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state." A tax " * * * is not converted into a valid exaction merely because a corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax * * *." There is no authority for the addition by petitioners of the state of original derivation to the state of domicile and the state of business situs as one of the list of states possessing jurisdiction to tax intangibles.

(f) The Privilege Dividend Tax can not be sustained upon the same jurisdictional basis as an income tax upon foreign corporations which do business within the state.

This topic is closely related to and perhaps should logically be regarded as a part of the discussion just concluded. It has seemed, however, that by treating it under a separate heading we might have more latitude in analyzing the differences between the instant tax and an income tax without destroying the inferential bearing of the argument here presented upon the constructive or business situs issue.

There is, of course, no question but what Wisconsin can impose an income tax upon foreign corporations which do business in that state. The Privilege Dividend Tax is not an income tax, however. It is an excise upon "the payment and receipt of dividends". There is an obvious difference between the two types of tax which is extremely important from the point of view of jurisdiction to tax. The *object* upon which the Privilege Dividend Tax is imposed is the *declaration and receipt* of dividends, which under the circumstances of this case does not take place in Wisconsin. In the case of an income tax, on the other hand, the object

of the tax is the earning of income within the state; it accrues as such income is earned and J. C. Penney Company has already paid a tax upon the income which petitioners now assert has become a part of the dividends here involved and by reason of which they seek to subject the payment and receipt of such dividends to tax (R. 27).

The difference between the two cases may best be illustrated by the use of a case which we feel presents substantially the same question. If an automobile is manufactured in Wisconsin, that state may certainly levy an excise tax upon its manufacture, *Hope Gas Co.* v. *Hall*, 274 U. S. 284 (1926); but, if the company manufacturing the automobile ships it to New York, places it in its salesroom and ultimately sells and delivers it to a New York customer, it could hardly be claimed that the automobile had such constructive situs in Wisconsin by reason of its manfacture as to subject it to a retail sales tax in that state. See *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, at p. 313 (1938), and *Delaware L. & W. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341 (1905).

The hypothetical case suggested clearly brings out the difference between a tax upon the earning of income and a tax upon the payment and receipt of dividends involving income previously earned. In the case of a non-resident or foreign corporation the basis of jurisdiction to levy an income tax is that the income *accrued* in the state. As the income is earned, liability to pay the tax is incurred. As income may be said to represent a continuous flow, the calculation of the tax is simply deferred until a given date for convenience in measurement. The fact that the income may have been withdrawn from the state before this calculation date arrives is, of course, entirely immaterial. This does not mean, however, that the tax may be regarded as being imposed upon a proportionate part of the corporate surplus as of the return day. It simply means that the corporation earning the income must pay the state's "meterage" charge or render its property within the state subject to execution.

In connection with the argument that in the instant case Wisconsin income had left the state and acquired a situs elsewhere before the declaration and receipt of the dividends here in question, it should be borne in mind that, although subsection (4) of the statute contains a presumption that dividends of corporations doing business both inside and outside of the state are paid from earnings attributable to Wisconsin for the preceding year, the tax is not limited to cases in which this presumption is not rebutted. Under the law, it would appear that, even though a corporate surplus had been accumulated for twenty years and no Wisconsin earnings realized during that period, the State Tax Commission would still be obliged to determine what part of a dividend paid by such corporation consisted of funds attributable to Wisconsin earnings, and assess a tax thereon. The instant case contains this consideration in some degree since, as hereinafter shown, at p. 47, the Tax Commission has presumed that in its 1936 dividends respondent paid the sum of $690,193.36 out of 1935 Wisconsin income, whereas its total 1935 income from Wisconsin was only $587,001.00.

The analogy which petitioners suggest exists between succession taxes and the instant case (p. 30) suggests another interesting comparison. In *Curry* v. *McCanless*, 307 U. S. 350, the decedent, a Tennessee resident, set up a trust with an Alabama trust company, reserving the right to dispose of the corpus by her will. This court held that both Tennessee and Alabama had jurisdiction to impose a succession tax. The facts of the case do not disclose from whence the original earnings represented by the intangibles in the trust may have been derived. However, it seems hardly likely that each state from which a part of the earnings so represented may have originally been derived would have been able to tax the succession to the extent of such part. We know of no decision which suggests that such a tax might be valid and *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1 and *Rhode Island Trust Co.* v. *Doughton*, 270 U. S. 69, are conclusive that it would not be.

Petitioners advanced the contention below that the tax is similar to a corporate income tax and should be treated as such notwithstanding the fact that the legislature imposed it upon the "privilege of declaring and receiving dividends * * *" and that the Supreme Court of Wisconsin had previously construed it as "an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders" (221 Wis. 233). That court instead of altering its previous construction of the law expressly reaffirmed it (233 Wis. 291). This Court is bound by the construction given the law by the Supreme Court of Wisconsin. *Knights of Pythias* v. *Meyer*, 265 U. S. 30 (1924); *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509 (1933). Petitioners have not renewed the above contention in their brief addressed to this Court and, therefore, are no doubt foreclosed from reasserting it.

As a part of our argument in asserting that the tax may not be sustained upon the same basis as an income tax, however, it has seemed desirable to deal briefly with several considerations which render it clear that the incidence of the tax is upon the declaration and receipt of dividends and not upon the earning of income.

In *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (1919), a tax upon manufacturing was measured by the amount of sales made. The taxpayer argued that the incidence of the tax was upon the sale rather than the manufacturing because it would be possible to manufacture goods to an unlimited extent and yet no tax would be due if they were not sold. This Court rejected the contention saying:

> "* * * it is not to be supposed that, for the purpose of evading a tax payable only upon the sale of his goods, a manufacturer would pursue the ruinous policy of making goods and locking them up permanently in warehouses. In the outcome the tax is the same in amount as if it were measured by the sale value of the goods but imposed upon the completion of their manufacture. The differ-

ence is that, for reasons of practical benefit to the taxpayer, the city has postponed payment until convenient means have been furnished through the marketing of the goods." (p. 464)

Subsequent cases would seem to require that in a case of this type the value at the time of manufacture be used as the measure of the tax and not the subsequent sale value. *Hope Gas Co.* v. *Hall*, 274 U. S. 284 (1926).

It is clear that under the test discussed in the *American Mfg. Co.* case the incidence of the Privilege Dividend tax *is, as the statute says it is, upon the declaration and receipt of dividends.* While in the case of manufacturing, it is hardly possible to conceive that any material portion of goods manufactured will not be sold, it is indeed most likely that a very large portion of income realized in one state by a corporation doing business in several will never be paid out in dividends.

In the first place net income is always added to the surplus of the corporation. The corporation may wish to expand in which case the surplus is invested in definite capital assets. Indeed, by an increase in par value of the shares or declaration of stock dividends, such surplus may find its way into the capital account of the corporation and no longer be available at all for dividends.

It is customary for most corporations to carry at least a moderate surplus from the net income in good years for the purpose of meeting losses during bad ones. If the surplus is lost in later bad years, it, of course, may not be paid out in dividends. Again, if the capital of the corporation is impaired the net income must be used to make up the deficit in this account and may not be used for dividends.

Doubtless, there are also cases in which corporations have very profitable operations in Wisconsin from which they derive large incomes and unprofitable business elsewhere through which they lose the income earned in Wis-

consin. It is self-evident that two corporations might each have net incomes in Wisconsin in a given year of $100,000 and one might pay a Privilege Dividend Tax of $2,500 and the other none at all.

There is another important distinction between the operation of the Privilege Dividend Tax and that of a corporate franchise or income tax. Income and franchise taxes are a part of the corporate expense; the Privilege Dividend Tax is not. If because of taxes the net income of a corporation having both preferred and common stock outstanding is insufficient to pay dividends upon both issues in full, those upon the preferred stock are paid and those upon the common reduced or passed. In the case of the Privilege Dividend Tax the amount of the tax is deducted directly from the dividends payable to both preferred and common stockholders. This would indicate conclusively that the incidence of the tax is upon the dividend transaction or upon the corporate stockholders and not upon the transaction of corporate business or the realization of corporate income.

From the foregoing it is apparent that there is no such close connection between the earning of income in Wisconsin by a foreign corporation which does business both within and without the state and its payment of dividends as to render a tax upon the one a tax upon the other. The language employed by this Court in the recent case of *Colorado National Bank of Denver* v. *Bedford*, 310 U. S. 41 (1940), is exactly in point.

> "The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling." (p. 52).

A careful reading of the Privilege Dividend Tax Law discloses that considered from the point of view of income tax analogies, it is much more similar to an income tax upon stockholders than upon the corporation. Part of the subject of tax is the receipt of income by stockholders. The corporation is required by Subsection 3 of the law to deduct the

tax from the stockholders' dividends. In the *Froedtert* case the Supreme Court of Wisconsin appeared to be influenced by this likeness since in discussing the tax it referred to *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60 (1920), a case involving an income tax collectible at the source.

Petitioners have advanced no contention that the tax should be sustained as an income tax upon stockholders and it would appear to be too clear to admit of serious controversy that the State of Wisconsin may not impose an income tax upon respondent's non-resident stockholders. See: *Domenech* v. *United Porto Rican Sugar Co.*, 62 Fed. 2d 562 (C. C. A. 1st 1932) cert. den. 289 U. S. 739.

An effort to do this would in substance amount to a disregard of respondent's corporate entity and it is clear that this may not be done. *Rhode Island Trust Company* v. *Doughton*, 270 U. S. 69; *Klein* v. *Board of Supervisors*, 282 U. S. 19 (1930); *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1. It is the policy of the State of Wisconsin to respect the corporate entity for tax purposes. *Ellinger* v. *Wisconsin State Tax Commission*, 229 Wis. 71, 281 N. W. 701 (1938). The State of Wisconsin certainly should not be permitted to disregard respondent's corporate entity in the instant case after having imposed an income tax upon respondent based upon the conception of respondent as a separate entity.

Any further consideration of possible similarities of the Privilege Dividend Tax to income taxes seems futile, since the Supreme Court of Wisconsin has conclusively construed it otherwise and no contrary assertion has been advanced by petitioners. The acknowledged power of the State of Wisconsin to impose an income tax upon foreign corporations doing business within the state does not furnish a basis of jurisdiction sufficient to support the tax here under consideration.

(g) The cases and statutes referred to in petitioners' brief are not similar and, therefore, have no bearing upon the instant case.

It may appear from the foregoing argument that respondent has to some extent failed to join issue with petitioners. Petitioners' brief does not make this overly easy to do as it has been difficult to determine exactly what the principles of jurisdiction are upon which they rely. It is fairly apparent, however, from their citation of *Bullen* v. *Wisconsin*, 240 U. S. 625 (1916), *Curry* v. *McCanless*, 307 U. S. 357 (1939), and *Graves* v. *Elliott*, 307 U. S. 383 (1939), that their argument principally rests upon an attempt to draw some analogy from estate tax cases, though a thorough going application of the rules governing such taxes would certainly indicate that the instant tax is unconstitutional. *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1 (1930); *Rhode Island Trust Company* v. *Doughton*, 270 U. S. 69 (1926).

In all of the three cases first referred to above a decedent domiciled in one state set up a trust of intangibles with a trustee in a second state. In two of the cases the decedent reserved a power of revocation; in the third, a power to dispose of the corpus by will. In these cases this Court held that both the state of the decedent's domicile and the state of the seat of the trust might impose a succession tax. These cases involve taxation by the state of domicile and the state in which a trust is conducted, each of which is a sound basis of jurisdiction. Neither of these bases is present in the instant case, however.

Petitioners have evidently cited the above cases as a basis of a possible analogy rather than because of their exact holdings. The attempted analogy, however, simply serves to emphasize the essential similarity of the Privilege Dividend Tax to an income tax upon stockholders as discussed at page 39 hereof. It has seemed fruitless to us to conduct *ab initio* an analysis of the various considerations which render it reasonable for a state to impose a tax in

one situation and not in another because the principles which petitioners would have to establish in order to support their attempted analogy are entirely inconsistent with numerous decisions of this Court. We have accordingly referred to and discussed those decisions of this and other courts which have established the principles in the field of state jurisdiction to tax which we deem applicable instead of attempting a critical analysis of the subject.

Petitioners say at page 53 of their brief:

> "The fact that a tax is measured by the 'amount of dividends declared' can not be made the basis of a tenable constitutional objection to a taxing act imposing a tax so measured. The use of 'amount of dividends declared' as the measure of a tax is not only proper, but just and equitable. Measuring of taxes by dividends paid is not new but is supported by precedent of long standing * * *."

A careful examination discloses that none of the statutes referred to by petitioners are sufficiently similar to the instant one to be of any assistance to petitioners' case. The first statute cited is Section 10, Chapter 3902, Laws of Pennsylvania of 1814. This law provided for the division of the state into banking districts and established a manner of incorporation of state banks. Section 10 of the act required banks so incorporated to pay a tax of 6% on dividends declared and provided that the charter of any bank which failed to pay the tax should be forfeited. This provision was obviously applicable only to banks incorporated under the act in question which were, of course, Pennsylvania corporations. It is hardly possible that the question could have arisen with respect to foreign banks since at that time there seems to have been a statute prohibiting banks incorporated in other states from doing business in Pennsylvania. See *Laws of Pennsylvania 1700-1846*, Dunlop, p. 203 (Chapter CLXV [Passed March 28, 1808]).

The second Pennsylvania statute referred to is Section 1, Act. No. 232, Laws of Pennsylvania, 1940. This section was obviously part of a general property tax law as may be discerned from an examination of its context and must be regarded as having imposed such a tax either upon the corporate property or upon the intangible property of the stockholder represented by the capital stock. The same observation holds true with respect to the three other Pennsylvania statutes cited. It will be noted that they provided for the imposition of an alternative form of tax based upon valuation in the event no dividends were paid. The Pennsylvania cases cited by petitioners support the above construction of these laws. See also *Pullman's Palace Car Co. v. Pennsylvania,* 141 U. S. 18 (1890). As so construed they obviously can have no bearing upon the instant case.

Petitioners state that the constitutionality of the Pennsylvania statutes seems to have been assumed. We see no reason for questioning their constitutionality if they be construed to have imposed a tax upon the property of the corporation. On the other hand, if their proper construction is that they imposed a property tax upon the intangible interest of the stockholder, they certainly would be invalid if applied to non-resident stockholders of foreign corporations. *State Tax on Foreign Held Bonds,* 15 Wall. (82 U. S.) 300 (1872); *First National Bank of Boston* v. *Maine,* 284 U. S. 312 (1932); *Farmers Loan and Trust Company* v. *Minnesota,* 280 U. S. 204 (1930); *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69 (1926).

Respondent took the alternative position before the Wisconsin courts that the law here involved should be construed as in substance levying a property tax either upon the stock or upon the dividends belonging to respondent's stockholders and that it is invalid as to stockholders residing outside of the State of Wisconsin. See, *Dawson* v. *Kentucky Distilleries and Warehouse Company,* 255 U. S. 288 (1920) and *Frick* v. *Pennsylvania,* 268 U. S. 473 (1924). Respondent renews that position at this time.

Petitioners cite several cases decided under Sections 182 and 186 of the New York Tax Law. Section 182 imposes a franchise tax on real estate corporations and Section 186 on water works, gas, electric, steam heating, light and power companies. These sections are a part of the New York franchise-income tax upon corporations which insofar as foreign corporations are concerned is imposed for the privilege of doing business in the state. Dividends paid are simply one of the items which are taken into account in calculating the amount of tax due. In addition to the fact that factors other than dividends paid must be considered in computing the franchise taxes referred to, they are distinguishable from the instant tax since the subject upon which they are imposed is the transaction of New York business which is certainly a proper subject. In this connection see: *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143 (1915); *Provident Savings Association* v. *Kentucky*, 239 U. S. 103 (1915), which indicate that a measure of tax which may be validly employed in connection with a proper subject of tax is insufficient to save a tax levied upon an improper subject. The foregoing observations are also sufficient to dispose of the New York franchise tax statutes involved in *Home Insurance Co.* v. *New York*, 134 U. S. 594 (1890) and *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305 (1892).

The petitioners also cite several cases involving the Federal Civil War income tax law, one of the provisions of which required corporations to deduct the amount of an income tax from dividends paid to stockholders. The provision with respect to the deduction of the amount of tax from dividends was a part of a scheme for the measurement of income devised by Congress long before the adoption of the method used in the present law. The method employed was to tax the corporation with respect to funds going into each of the "corporate pockets" into which income might be put. Dividends were simply one of those named. *Railroad Co.* v. *Collector*, X Otto (100 U. S.) 595 (1879). The

law was a federal and not a state law, and the method of measurement of income was approximately fair. The differences between this tax and the instant tax imposed upon the payment and receipt of dividends are obvious.

From the foregoing analysis of the various statutes referred to by petitioners in which dividends were taken into consideration in calculating the taxes thereby imposed, it is plain that they furnish no authority tending to support the validity of the tax here under consideration.

As has been demonstrated above, the assessment made against the respondent cannot be sustained upon the ground that the transaction taxed took place within Wisconsin or that it involved the exercise of a privilege granted by that state. The Supreme Court of Wisconsin has construed the tax imposed as an excise tax upon a transaction and in the case of such a tax the situs of the subject matter of the transaction is immaterial. In any event the surplus from which the dividends here involved were paid had no situs for taxation in Wisconsin. Furthermore, we have shown that the tax may not be sustained upon the same jurisdictional basis as an income tax upon foreign corporations which do business within the state. The obligation to pay a tax upon its activities elsewhere may not be imposed upon the respondent as a price of doing local business and the State of Wisconsin has made no effort to do so. There is no other possible basis of jurisdiction upon which the Privilege Dividend Tax might be supported and it is accordingly clear that the Supreme Court of Wisconsin correctly applied the various decisions of this court construing the Fourteenth Amendment to the Constitution of the United States, in holding the instant assessment invalid.

POINT II.

The assessment here involved is further void because the tax was calculated pursuant to the statutory presumption that the dividends in question were paid from the previous year's income and contained an exactly proportionate part of the Wisconsin earnings for such year. Such presumption is plainly not in accord with the true facts and is, therefore, either rebutted or is void as arbitrary and unreasonable. If the true effect of such presumption is to establish a rule of substantive law requiring foreign corporations to declare their dividends from any particular source, such presumption amounts to an unconstitutional attempt to regulate the activities of foreign corporations outside the state.

Subsection 4 of the tax law contains the following presumption which was employed by the Tax Commission in computing the assessment here involved:

> "(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and properly located within the state."

In the instant case the presumption was applied as follows: The percentage of respondent's total income for the year previous to that in which each dividend was declared made up of Wisconsin earnings was first ascertained pursuant to the Wisconsin income tax formula. The total dollar value of dividends paid was then multiplied by such percentage. The result was considered the portion of the dividends attributable to Wisconsin earnings and subject to tax.

It would seem clear from the language of the statute that the presumption may be rebutted in some cases at least and is not to be treated as conclusive. Respondent contends that the presumption has been rebutted by the facts in the instant case and that the State Tax Commission erred in applying it. This contention was urged before the Supreme Court of Wisconsin but it failed to pass upon it. As it represents an additional ground for sustaining the result of the decision of that court, we are again urging it at this time.

Section 34 of the Delaware Corporation Law from which respondent derives its dividend paying powers is as follows:

> "The directors of every corporation created under this chapter, subject to any restrictions contained in its certificate of incorporation, shall have power to declare and pay dividends upon the shares of its capital stock either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Sections 14, 26, 27 and 28 of this chapter, or (b) in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding fiscal year." (R. 38).

The following section of the Delaware Law provides:

> "No corporation created under the provisions of this chapter, nor the directors thereof shall pay dividends upon any share of the corporation except

> in accordance with the provisions of this chapter." Delaware Corporation Law, Sec. 35, Revised Code of Delaware, 1935, Sec. 2067.

At the end of the calendar year 1934 the respondent had a surplus of $29,279,543.14; and at the end of 1935, a surplus of $36,072,252.54 (R. 35). This surplus represented earnings accumulated by it and its predecessor company since 1916 from all of the forty-eight states (R. 41). Wisconsin earnings and earnings for particular calendar years entering into such surplus were not segregated and had lost their character as earnings from any particular source or year long before the dividends here involved were paid and it would be a Herculean task to figure what part of the surplus was attributable to Wisconsin stores (R. 29, 41, 42). The dividends sought to be taxed were all paid out of respondent's general surplus in accordance with resolutions which recited that they were declared "from the surplus of the company" (R. 35). As above noted it would have been unlawful for respondent to have paid the dividends in question from the presumed source.

These facts are certainly sufficient to rebut any presumption that respondent's stockholders received as dividends in either December 1935 or in the year 1936 an exactly proportionate part of respondent's Wisconsin earnings for the respective preceding year. Indeed, this would have been manifestly impossible for in 1936 respondent was "presumed" to have paid $17,900,134.00 in dividends out of total 1935 earnings of $15,223,478.00 (Ex. A, R. 47, 44). Under the formula used by the Wisconsin Income Tax Law, $587,001.00 of respondent's 1935 income was treated as derived from within that state, yet in preparing the assessment here involved the State Tax Commission presumed that $690,073.36 of 1936 dividends was paid from such sum (Exhibit A, R. 47, 44).

If the presumption is properly construed as a rebuttable one, it certainly must be deemed rebutted. On the other

hand, if it must be construed to require a finding of fact which is contrary to the undisputed facts in the record, the presumption itself is unconstitutional as arbitrary and unreasonable. *Schlesinger* v. *Wisconsin,* 270 U. S. 230 (1926); *Heiner* v. *Donnan,* 285 U. S. 312 (1932).

The third possibility exists that the true purport of the law is that it directs foreign corporations which do business in the state to declare their dividends from a specific source; that is, that by being irrebuttable the presumption establishes a rule of substantive law. See: *U. S.* v. *Provident Trust Co.,* 291 U. S. 272, (1934) at p. 283. That this is the construction given to the law by the State Tax Commission is suggested by the fact that it refused to regard the presumption as rebutted by a specific corporate resolution inconsistent with it even though passed in accordance with the statutes of the state of incorporation. The Supreme Court of Wisconsin has thus far had no occasion to construe this presumption.

Even if the presumption be construed as establishing a rule of substantive law, it is invalid, however. As previously stated at page 17 hereof, the privilege of paying dividends is conferred and governed by the law of the state of incorporation. The State of Wisconsin certainly has no power to direct from which part of its surplus payment of dividends shall be made by a foreign corporation. *Modern Woodmen* v. *Mixer,* 267 U. S. 544 (1925); *Chandler* v. *Peketz,* 297 U. S. 609 (1936); *Converse* v. *Hamilton,* 224 U. S. 243 (1912) at p. 260. Any such attempt would be an unconstitutional interference with the privileges of a foreign corporation exercised beyond its jurisdiction. *New York Life Insurance Co.* v. *Head,* 234 U. S. 149 (1914); *Baldwin* v. *Seelig,* 294 U. S. 511 (1935).

The law of some one state must be competent to determine from what source corporate dividends shall be paid. In the instant case the Delaware law is that law.

To allow each of the forty-eight states to direct from what source a corporation shall pay dividends would breed chaos.

If the statutory presumption is rebuttable, the facts in the record are sufficient to rebut it. If it is irrebuttable, it is either void as being arbitrary and unreasonable or it establishes a rule of substantive law. If it establishes a rule of substantive law, however, such rule may not be applied to foreign corporations. In any case the presumption is inoperative as to the instant case and the assessment accordingly invalid.

Conclusion.

It must be apparent from the foregoing argument that the Supreme Court of Wisconsin correctly applied the applicable decisions of this court in holding the assessment here involved invalid. There can be no question but what the State of Wisconsin can impose a tax upon respondent's Wisconsin income and it has done so, thus deriving the revenue to which it is entitled by reason of respondent's earning of income within the state. If it chooses it no doubt may also levy a franchise tax for the privilege of doing business within the state. It may levy a property tax upon the tangible and intangible property of the respondent situated within the state. It may tax the various transactions in which respondent is engaged within the state by a sales, check or other type of transaction tax. Doubtless there are other types of tax which the state may properly impose under the existing principles of constitutional law. Surely these admittedly proper forms of taxation are sufficient to permit the state to meet its legitimate needs for revenue and to exact taxes reasonably related to the governmental protection which it affords. There can be no necessity for this court to alter the established law regarding state jurisdiction to tax and to sustain the principles underlying the instant tax. As has been above demonstrated, to do so would necessarily destroy in part the order which the Four-

teenth Amendment to the Constitution of the United States, and the decisions of this Court have thus far established in the field of state jurisdiction to tax.

The judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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